IN THE SUPREME COURT

APPEAL FROM THE
MICHIGAN COURT OF APPEALS

Judges Patrick M. Meter, Michael J. Talbot and Stephen L. Borrello

THE DETROIT EDISON COMPANY,

Appellant,

Supreme Court Case No. 125950

v

Court of Appeals No. 237872

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee

In the matter of the approval of a code of conduct for CONSUMERS ENERGY COMPANY and THE DETROIT EDISON COMPANY	MPSC Case No. U-12134

REPLY BRIEF ON APPEAL - APPELLANT THE DETROIT EDISON COMPANY

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INTRODUCTION

On January 3, 2005, The Detroit Edison Company ("Edison"), the Michigan Electric Cooperative Association ("MECA"), and Consumers Energy Company ("Consumers") filed briefs on appeal in Case Nos. 125950, 125954 and 125955, respectively. On February 7, 2005, the Michigan Alliance for Fair Competition ("MAFC") and the Michigan Public Service Commission ("MPSC" or "Commission") (collectively, "Appellees") filed briefs. Edison now files this combined reply. Edison relies on its initial brief and concurs with MECA and Consumers. Edison's avoidance of repetition and corresponding failure to address any position in this reply should not be deemed to constitute an agreement with that position.

ARGUMENT

I. THE MPSC'S CODE OF CONDUCT IS UNLAWFUL BECAUSE IT WAS NOT ADOPTED IN COMPLIANCE WITH THE RULEMAKING PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT.

A. No Exception Excuses The MPSC From Rulemaking Requirements.

Edison explained (pp 7-12)[1] that the Code of Conduct is invalid due to the Commission's failure to comply with the Administrative Procedures Act's ("APA") rulemaking requirements, and controlling case law. Edison further explained (pp 12-19) that the "contested case" exception to rulemaking does not apply here, and even if it did, the Commission failed to comply with the essential requirements of an adjudicative proceeding. The Commission responds (pp 10-16, see also MAFC, pp 20-25) that it had the discretion to establish the Code of Conduct pursuant to orders in a contested case. Appellees' legal position is incorrect, and unsupported by even their own cited authority.

[1] Parenthetical page numbers refer to the page numbers of the referenced party's brief.

For example, Northern Michigan Exploration Co v Public Service Comm, 153 Mich App 635; 396 NW2d 487 (1985) involved rulemaking. There, the Commission adopted a proration method pursuant to the Commission's "rule making authority" (Id, at 649), and later issued a proration order in the specific case on appeal, modifying the rule's proration methodology in light of the unique characteristics of the reservoir at issue. Id, pp 649-51. Appellees' reliance on American Way Life Ins Co v Comm'r of Ins, 131 Mich App 1; 345 NW2d 634 (1983) (and authorities cited therein) is similarly misplaced and mischaracterized. It is undisputed that an agency need not promulgate rules to cover "every conceivable situation" or "particular, unforeseeable situations." An agency must promulgate rules to cover situations generally, however. MCL 24.207. The Code of Conduct does not concern a "particular unforeseeable situation" that arose following the enactment of general rules. The Commission skipped the rulemaking process.

Moreover, the "contested case" exception is limited to case-specific adjudicatory proceedings, and requires the resulting order to be based on the record of that case. In contrast (as Edison explained, pp 14-19), the Commission does not rely on the record below or any specific adjudicatory situation. Instead, the Commission has enacted onerous and overbroad generic rules regarding future conduct based on the assertion that the "Commission is well aware from past audits and reports of affiliate transactions, in this state and elsewhere, of the opportunities and incentives for abuses" (December 4, 2000 Opinion and Order, p 6; Appendix 61a).[2]

[2] The Commission asserts that its Orders were "based upon the substantial record evidence" (p 9, see also p 4), but makes no citations to the evidentiary record in its brief. There are also no citations to the evidentiary record in the MAFC's brief.

The MAFC's reliance (p 24) on Midland Cogeneration Venture Limited Partnership v Public Service Commission, 199 Mich App 286; 501 NW2d 573 (1993) is misplaced because there, MCL 460.55 expressly authorized the Commission to require a regulated utility to provide information regarding the utility's parent corporation and nonregulated activities, and MCL 460.56 authorized the Commission to inspect books and records. Here, in contrast, there is no such express authority, and the Code of Conduct requires far more than just the disclosure of information. Midland Cogeneration Venture further held that the Commission lacks authority to impose accounting and bookkeeping requirements on nonregulated entities. 199 Mich App at 300-304. Judge (now Justice) Taylor dissented in part, emphasizing the limits of the Commission's statutory authority, and recognizing that the case involved "the first step of a process of regulating entities that the PSC lacks the power to regulate, and constitutes an improper assertion of PSC jurisdiction." 199 Mich App at 327. That case led to In re Public Service Commission Guidelines for Transactions Between Affiliates, 252 Mich App 254; 652 NW2d 1 (2002) ("In re PSC Guidelines"), in which the Court of Appeals recounted this history, and vacated the Commission's subsequent "affiliate transaction guidelines" because the Commission failed to comply with the APA's rulemaking requirements.[3]

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[3] The Commission suggests (p 5; see also MAFC, pp 9-11) that ambiguities can be clarified and specific facts can be addressed through the waiver process. Edison did request waivers. The Commission again (like in its December 4, 2000 Opinion and Order, p 6; Appendix 61a) ruled without any basis in the record. Instead, the Commission relied on unidentified "letters expressing concern about utilities" (October 3, 2002 Edison Order; Appendix 134a). Moreover, even though the In re PSC Guidelines Court vacated the Commission's "affiliate transaction guidelines" due to the Commission's failure to comply with the APA's rulemaking requirements, the Commission simply re-imposed the same "affiliate transaction guidelines" as conditions for granting waivers from the Code of Conduct. Compare the vacated guidelines (quoted at 252 Mich App at 259-60) with the conditions that the Commission imposed on Edison and its affiliates (October 3, 2002 Edison Order, Appendix 136a-137a). The Commission's October 3, 2002 Orders are the subject of separate applications for leave to appeal that are pending before this Court. See Edison's initial brief, pp 5-6, n 5.

The Commission (pp 16-18) and MAFC (pp 25-27) assert that the Code of Conduct is a discretionary exercise of "permissive statutory power" that is exempt from the APA's rulemaking requirements under MCL 24.207(j). Edison did not address this matter previously, since it does not appear to form any basis for the Court of Appeals' decision. Detroit Edison Company v Public Service Comm, 261 Mich App 1, 12; 680 NW2d 512 (2004), lv granted 688 NW2d 510 (2004); (Appendix 238a). Assuming this exception is relevant, Appellees' own cited authority demonstrates that this exception does not apply here, because it gives agencies only a limited ability to avoid rulemaking for certain details of regulation. Colombini v Dept of Social Services, 93 Mich App 157; 165; 286 NW2d 77 (1979) (regarding agency's policy of using a client reporting system to implement the agency's authority to review eligibility for assistance); Hinderer v Dept of Social Services, 95 Mich App 716, 725-27; 291 NW2d 672 (1980) (regarding agency's policy of using a lag budgeting system to compute benefit payments); Pyke v Dept of Social Services, 182 Mich App 619, 629-31; 453 NW2d 274 (1990) (regarding agency's policy of considering one spouse's receipt of supplemental security income benefits in assessing the other spouse's eligibility for general assistance benefits). This Court previously discussed this line of cases, and clarified that an agency cannot increase its own statutory authority, nor avoid statutory requirements, by labeling its action as an exercise in "permissive statutory power." Coalition for Human Rights v DSS, 431 Mich 172, 188; 428 NW2d 355 (1988). The Court of Appeals also rejected this line of cases, and instead followed Judge Shepherd's dissent in Pyke regarding rulemaking requirements. Palozolo v Dept of Social Services, 189 Mich App 530, 533; 473 NW2d 765 (1991), lv den 439 Mich 879 (1991).

Appellees' reliance on Michigan Trucking Ass'n v Public Service Comm (On Remand), 225 Mich App 424; 571 NW2d 734 (1997) is similarly misplaced. There, the Court of Appeals

upheld a Commission order implementing a safety rating system for motor carriers, because the Legislature "directly and explicitly authorizes the PSC to implement, either by rule or by order, a safety rating system for motor carriers".[4]

Since the "contested case" and "permissive statutory authority" exceptions to rulemaking do not apply, there is no merit in the Commission's (pp 18-19) and MAFC's (pp 28-29) attempts to distinguish In re PSC Guidelines, supra, based on those exceptions. That case is controlling precedent, and the Court of Appeals reversibly erred by not following it, as Edison previously explained (pp 3, 11-13).

MAFC claims (pp 30-32) that Edison waived its rulemaking argument by allegedly prevailing on a position below, and now taking an inconsistent position. MAFC mischaracterizes the response that Edison filed to the MAFC's motion to reopen, re-notice and supplement the proceedings in the Commission (Appendix 8b-11b). Edison was required to participate in the proceedings (Appendix 47a-50a) and Edison's response to the MAFC addressed the scope of the hearing. The APA sets forth additional requirements for rulemaking.[5] Edison did not address, and certainly did not waive, these rulemaking requirements (even

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[4] Michigan Trucking concerned MCL 479.43, which relevantly provided: "The Michigan Public Service Commission, in cooperation with the department of state police, will develop and implement **by rule or order** a motor carrier safety rating system within 12 months after the effective date of this article." (emphasis added) The Commission acknowledges the Legislature's direct authorization of the Commission's order in that case, but the Commission quotes only the Court's dicta that: "In addition, it is reasonable to assume . . ." that rulemaking would have been impossible under the statutory time requirements (Commission brief, p 17, quoting Michigan Trucking, supra, 225 Mich App at 433). In contrast, 2000 PA 141, MCL 460.10 et seq ("Act 141") did not "directly and explicitly" authorize the MPSC to enact a code of conduct by an order, and rulemaking certainly could have been accomplished in the time that has been spent on the Code. Act 141 took effect on June 5, 2000. This appeal concerns the Code of Conduct that the MPSC issued on October 29, 2001 (Appendix 108a-13a).

[5] The APA's rulemaking requirements include far more than just a hearing, and concern the allocation of decision-making authority (see, Edison's initial brief, pp 19-20).

assuming, arguendo, that the APA's rulemaking requirements could be waived). Edison's response concerned limited proceedings that were expected to result in a correspondingly limited code of conduct regarding Customer Choice.[6] The August 22, 2000 record (following Act 141's June 5, 2000 effective date and Edison's June 23, 2000 response) reflects that the Commission's own Staff "believes that the standards produced by this docket should apply only to the Retail Open Access Participants, Detroit Edison's 90 MW Experiment program and Consumers Energy's direct access program" (11 T 792; Appendix 55a). Even the MAFC acknowledges (p 6) that the proceedings were noticed only to electric utilities and alternative electric suppliers. This notice reflects the limited scope of the proceedings (see also, Appendix 54a). The Commission, however, issued a broad Code of Conduct that extends far beyond Customer Choice. Edison did not, and could not, waive anything through its June 23, 2000 response (Appendix 8b-11b) because the Commission first revealed its belief that "Act 141 changed the nature of this case" in its December 4, 2000 Opinion and Order (Appendix 61a, n 2).

B. Appellees' Reliance on the Reenactment Rule is Misplaced.

The Commission claims (pp 19-22, see also MAFC, pp 17-18) that the Legislature ratified the Code of Conduct by reenacting MCL 460.10a(4). Appellee's position fails for several reasons.

First, the reenactment argument is irrelevant to this appeal concerning the APA's rulemaking requirements. Even Appellees do not claim that the Legislature reenacted any part of the APA to purportedly allow the Commission to avoid rulemaking requirements.

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[6] "Customer Choice" is the term now most commonly used to describe retail open access ("ROA") electric generation service in Michigan, which is also sometimes called "retail wheeling."

Second, MAFC's position is unsupported by legal authority, and the Commission asserts an overbroad characterization of the rule that ignores this Court's recent decisions. The reenactment rule is a limited tool for determining legislative intent only where statutory language is ambiguous. In cases such as this where statutory language is clear, that language must be applied, not interpreted, by the Courts (See Edison's initial brief, pp 7-12). Jones v Dept of Corrections, 468 Mich 646, 657-58; 664 NW2d 717 (2003) (declining to apply the reenactment rule, and explaining that it would be "equally plausible" to draw completely different conclusions in the absence of clear language that the Legislature intended to adopt or repudiate a prior judicial interpretation). See also, Donajkowski v Alpena Power Co, 460 Mich 243, 261; 596 NW2d 574 (1999) (clarifying that the related doctrine of "'legislative acquiescence' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence").

Third, Appellees' characterization of 2004 PA 88 in relation to this case is inaccurate. 2004 PA 88 was a limited amendment to Act 141, which provides that "[a]n electric utility may offer its customers an appliance service program." MCL 460.10a(5). By its plain language, the Legislature intended to authorize appliance service programs by electric utilities, as limited by further provisions of 2004 PA 88 – and nothing more. This amendment to Act 141 essentially responded to concerns by Consumers, which is a combined gas and electric utility.[7] Appellees' speculative assertions regarding legislative intent are unsupported and contradict separation-of-

[7] Edison does not have an appliance repair program. Michigan Consolidated Gas Company ("Mich Con") has an appliance repair program. Edison's parent, DTE Energy, acquired Mich Con in 2001, after Mich Con had operated as an independent gas company for over 150 years. Edison and Mich Con remain functionally separate utilities. The Commission regulates Mich Con's appliance repair program through gas proceedings that do not include Edison. Act 141's Code of Conduct provisions for electric utilities do not concern Mich Con's regulated gas activities. Mich Con is governed by a different code of conduct, as the Commission has acknowledged (Appendix 102a, n 4). Mich Con is not, and has never been, a party in this case.

powers principles. The Legislature has no duty to keep abreast of various judicial and administrative pronouncements and address them in statutes, which the Legislature amends for entirely different reasons. People v Hawkins, 468 Mich 488, 508-10 and n 19-21; 668 NW2d 602 (2003) (declining to apply the reenactment rule, and explaining in detail the untrustworthiness of attempting to discern legislative intent in the absence of circumstances demonstrating the Legislature's "conscious consideration" of a prior judicial interpretation of a statute, plus some "compelling indication" that the Legislature intended to accept or reject that interpretation).

In 2004 PA 88, the Legislature essentially reenacted MCL 460.10a(4)'s code of conduct provisions, and required compliance with them, "[e]xcept as otherwise provided by this section" MCL 460.10a(5). Contrary to Appellees' unfounded speculation, this language simply reflects that 2004 PA 88 had the limited purpose of providing that an electric utility may offer an appliance service program. Reenactment of MCL 460.10a(4) does not reflect any intent by the Legislature to even consider the issue before this Court. Edison did not challenge the Commission's ability to enact a code of conduct. This appeal concerns the Code of Conduct that the Commission issued in violation of the APA's rulemaking requirements.

Fourth, if the Legislature "reenacted" MCL 460.10a(4), it did so with one significant change – requiring the Commission to establish a code of conduct "[n]o later than December 2, 2000." The Commission issued its first code of conduct on December 4, 2000 (Appendix 78a-81a). This appeal concerns the Code of Conduct that the MPSC issued on October 29, 2001 (Appendix 108a-113a). Thus, the Code of Conduct is contrary to the plain language of MCL 460.10a(4). If knowledge is to be attributed to the Legislature, then the Legislature presumably knew when the Commission issued its Code of Conduct; and if intent is to be attributed to the

Legislature, then the Legislature's specification of a December 2, 2000 deadline indicates that the Commission's subsequent Code of Conduct is invalid.[8]

C. Compliance With Rulemaking Procedures Is An Essential Protection Against the Commission Exceeding the Scope of Its Limited Authority.

Edison explained (pp 19-23) that the Legislature established essential checks and balances in the APA rulemaking procedures to prevent the exact type of unauthorized self-expansion of administrative agency power that has occurred here. The Commission (pp 23-24) declines to address these matters directly; however, the Commission claims broad powers throughout its brief. In addition to claiming broad authority based on 2004 PA 88 (discussed above), the Commission claims (p 14) that it may do things unless prohibited by statute. The Commission's position is backwards, since the Commission has no authority other than the authority that the Legislature grants to it. Consumers Power Co v Public Service Comm, 460 Mich 148, 155; 596 NW2d 126 (1999); Midland Cogeneration Venture, supra, 199 Mich App at 326 (Taylor, J., dissenting, "If there is no statute telling the PSC that it can do something, then the PSC cannot do that thing.")

The Commission acknowledges (p 2) that in response to Consumers Power (holding that the Commission lacked statutory authority to require the Customer Choice), the Legislature enacted Act 141 which "expanded the existing powers of the Commission so as to authorize it to implement a framework '[t]o ensure that all retail customers in this state of electric power have a choice of electric suppliers'" (MPSC brief, p 2, quoting MCL 460.10(2)(a)). The Commission further acknowledges (p 3) that the Legislature directed the Commission to establish a code of conduct to prevent electric utilities from having "an unfair advantage when competing in the

[8] The prior codes of conduct would remain valid, however (Appendix 49a).

supply market." (Emphasis added). In other words, the Legislature gave the Commission limited authority only to address one market – concerning the supply of electricity.

The Commission's reliance (p 1) on Act 141 as an amendment to Act 3, MCL 460.1 et seq, is misplaced. The Commission's Act 3 authority is limited (Consumers Power, supra 460 Mich at 159-61) and has merely been supplemented by Act 141's incremental grant of authority over Customer Choice. Although the Court of Appeals (261 Mich App 9; Appendix 235a) upheld the Code of Conduct based on Section 6 of Act 3, MCL 460.6, neither the Commission nor the MAFC attempt to support that holding. It is undisputed that MCL 460.6 "merely serves as an outline of the Commission's jurisdiction, not as grant of specific authority or power." Union Carbide v Public Service Comm, 431 Mich 135, 147; 428 NW2d 322 (1988).

The Commission cannot lawfully evade the rulemaking requirements that the Legislature set forth in the APA, by attempting to empower itself in violation of the limitations that the Legislature set forth in the Commission's enabling statutes. Accordingly, in addition to requiring adherence to the APA's procedural requirements for rulemaking, the Court should direct that any rules promulgated on remand should be limited to the scope of the MPSC's regulatory authority.

Respectfully submitted,

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